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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

KARL WADE,

Petitioner,

vs.

CITY OF INGLEWOOD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is there a triable issue regarding municipal liability because there were facts available to the City of Inglewood policymakers sufficient to place them on constructive notice that a failure to train their police officers in the constitutional limitations of state involvement in private repossessions of property was substantially certain to result in violation of Petitioner's constitutional rights?

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Petitioner, Karl Wade, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is an unreported memorandum decision and is reproduced in the Appendix filed herewith at ("App."), App. at 1a-6a. The unreported opinion of the district court in this case is reproduced at App. at 7a-21a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on March 11, 1997. A Petition for Rehearing and Suggestion for Rehearing En Banc was denied on April 29, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of 42 U.S.C. § 1983 and the Fourth and Fourteenth Amendments of the United States Constitution is set forth below:

Section 1 of the Klu Klux Act of 1871, Rev. Stat. 21979, as amended, 42 U.S.C. § 1983, provides:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state. . . . Subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights privileges or immunities secured by the

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

The Fourth Amendment to the United States Constitution states:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution, Section 1 states in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On September 14, 1994, Petitioner and his daughter, Nicole Wade had an argument about her lack of attendance at college. (App. at 8a).

Nicole Wade, who had been living with her parents in their

Inglewood home, fled the premises after the argument, and shortly thereafter, she called the Inglewood Police Department to obtain assistance in retrieving some of her personal belongings from her parents' house, including her car. (App. at 8a).

Petitioner, claimed a possessory interest in the car, since most of the purchase money came from the Petitioner and his wife, and the maintenance and insurance on the car was always paid from Petitioner's family business. (App. at 8a). Nicole Wade admits that the car was erroneously registered in her name. (App. at 8a).

Pursuant to an officer assistance call on September 14, 1994, Officer Robert Wallace of the Inglewood Police Department was dispatched to meet Nicole Wade outside of her parents' house.

Nicole Wade, joined by her boyfriend and one other friend met Officer Wallace outside of her parents house, and explained she wanted assistance in retrieving her car. (App. at 8a).

The car was parked, out of view from the street, behind Petitioner's house. (App. 8a).

Officer Wallace, before venturing onto Petitioner's property, did not obtain the license plate of the car, check its registration, or otherwise confirm that Nicole Wade was the owner. (App. 8a-9a).

Officer Wallace, Nicole Wade, and her two friends then proceeded down the driveway of the house to the car, where Petitioner met them and stated that the car was his, and that his daughter could not take it away. After Officer Wallace determined that Nicole Wade was the registered owner, he then told Petitioner that "She [Nicole] gets the car." (App. at 9a).

A verbal assault began between Petitioner, his son Euan Wade, who came outside the house, and Nicole Wade's two friends. (App. at 9a).

Petitioner then asked Officer Wallace to leave the property and to remove his daughter's friends from the property. (App. at 9a).

Officer Wallace refused to leave the property, and with nine police officers that responded to his call for back-up, proceeded to remove the car from the premises; after which Nicole Wade collected her other personal effects and left the house. (App. 9a).

On November 23, 1994, Petitioner sued under 42 U.S.C. § 1983 alleging violation of his constitutional rights under the Fourth Amendment as incorporated by the Fourteenth Amendment and the Fourteenth Amendment to the United States Constitution.

Respondent filed a motion for summary judgment asserting that there was no evidence that the police officers involved acted pursuant to official policy, custom or practice of the City of Inglewood or its police department.

Respondent's motion was granted by the district court on October 26, 1995. (App. at 7a-21a).

Petitioner filed a timely appeal from the district court's grant of summary judgment in favor of Respondent. The Panel affirmed the judgment. (App. at 1a-6a).

Petitioner was granted an extension of time to file a Petition for Rehearing. On April 1, 1997, Petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied on April 29, 1997. (App. at 22a-23a).

REASONS FOR GRANTING THE WRIT

In concluding that Petitioner failed to identify a municipal "policy" or "custom" that caused the seizure of his car by the Inglewood Police Officers, *see, e.g., Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 692, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611; *Pembaur v. Cincinnati,* 475 U.S. 469, 480-481, 106 S. Ct. 1292, 1298-1299, 89 L. Ed. 2d 452, the district court stated, "[w]ithout any evidence of past unlawful seizures, plaintiff has not established that defendant has shown 'deliberate indifference' to constitutional rights through a failure to train officers like Wallace about proper procedures in 'officer assist calls.' " (App. at 20a).

Petitioner argued in his Petition for Rehearing and Suggestion for Rehearing En Banc, that in the case at bar, the single violation of Petitioner's right to minimal procedural due process (*i.e.*, notice and a prior hearing) prior to significant state involvement by police officers in a repossession of property, *Sniadach v. Family Finance Corp. of Bay View,* 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969); *Fuentes v. Shevin,* 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972); *Harris v. City of Roseberg,* 664 F.2d 1121, 1127 (9th Cir. 1981); *Howerton v. Gabica,* 708 F.2d 380, 383 (9th Cir. 1983); coupled with the need to train officers in the constitutional limitations of such private repossessions, "can be said to be 'so obvious', that failure to do so could properly be characterized as 'deliberately indifferent to the need.' " *City of Canton, Ohio v. Harris,* 489 U.S. 378, 390 and n. 10, 109 S. Ct. 1197, 1205 and n. 10, 103 L. Ed. 2d 412 (1989).

Last term the court decided *Bd. of County Com'rs of Bryan County, Okl. v. Brown,* __ U.S. __, 117 S. Ct. 1382, __ L. Ed. 2d __ (1997) and it appears that the court did not foreclose Petitioner's argument in a failure to train situation. *Id.* at 1391.

("In *Canton,* we did not foreclose the possibility that evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability. 489 U.S. at 390, and n. 10, 109 S. Ct. at 1205, and n. 10." (quotation omitted).

Bd. of County Com'rs of Bryan County, Okl. v. Brown, supra, was decided on April 28, 1997. Petitioner's request for a Rehearing and Suggestion for Rehearing En Banc was denied on April 29, 1997. (App. at 22a-23a).

Petitioner respectfully requests review of the lower court judgment to determine if he has established that facts were available to the City of Inglewood policymakers that placed them on constructive notice that a failure to train their police officers in the constitutional limitations of state involvement in private repossessions of property was substantially certain to result in the violation of Petitioner's constitutional rights.

The question raised by this Petition "is important and appears likely to recur in § 1983 litigation against municipalities." *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 257, 101 S. Ct. 2748, 2754, 69 L. Ed. 2d 616 (1981), and the definition of municipal liability in circumstances presented by the case at bar, requires clarification by the Court.

I.

IS THERE A TRIABLE ISSUE REGARDING MUNICIPAL LIABILITY BECAUSE THERE WERE FACTS AVAILABLE TO THE CITY OF INGLEWOOD POLICYMAKERS SUFFICIENT TO PLACE THEM ON CONSTRUCTIVE NOTICE THAT A FAILURE TO TRAIN THEIR POLICE OFFICERS IN THE CONSTITUTIONAL LIMITATIONS OF STATE INVOLVEMENT IN PRIVATE REPOSSESSIONS OF PROPERTY WAS SUBSTANTIALLY CERTAIN TO RESULT IN VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS?

Last term in *United States v. Lanier,* __ U.S. __, 117 S. Ct. 1219, __ L. Ed. __ (1997) the Court stated:

> "When broad constitutional requirements have been 'made specific' by the text or settled interpretations, willful (violators) certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment . . . [T]hey are not punished for violating an unknowable something." *Id.* at 1225-1226.

United States v. Lanier, supra, deals with the standard notice required in determining the "fair warning" requirement for criminal liability under 18 U.S.C. § 242. The Court went on to clarify that not only the Court's prior decisions could provide the required notice but rights made specific by "decisions interpreting" the Constitution, may include "[a] decision of a Court of Appeals in defining the established scope of a constitutional right for purposes of § 241 liability." *Id.* at 1226.

The Court also stated that in applying the rule of qualified

immunity under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Narcotics Agents,* 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), "[w]e have referred to decisions of the Court of Appeals when inquiring whether a right was 'clearly established.' " (Citations omitted) *Id.* at 1226.

To quote the Court:

> "In the civil sphere, we have explained that qualified immunity seeks to ensure that defendants 'reasonably can anticipate when their conduct may give rise to liability', by attaching liability only if '[t]he contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates the right.'
>
> * * *
>
> The fact that one has a civil and the other a criminal law role is of no significance, both serve the same objective and in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials (*and, ultimately governments*) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes. To require something clearer than 'clearly established' would then, call for something beyond 'fair warning.' "

Id. at 1227.

"Fair warning" does not preclude "notable factual

distinctions between the precedents relied on and the cases then before the court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Id.* at 1227.

In *Fuentes v. Shevin, supra,* appellants signed conditional sales contracts and lacked full legal title to the replevied goods. But the Court found that the Fourteenth Amendment's protection of "property", however, "[h]as never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend to protection to 'any significant property interest.' " *Id.* at 1997 (citations omitted).

And although in the case at bar the ultimate right to possession was in dispute, Petitioner's right to be heard "does not depend upon an advance showing that one will surely prevail in the hearing." *Id.* at 1997 ("To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits") (quoting *Coe v. Armour Fertilizer Works,* 237 U.S. 413, 424, 35 S. Ct. 625, 629, 59 L. Ed. 1027); *see also Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86, 108 S. Ct. 896, 900, 99 L. Ed. 2d 75 (1988).

Unlike the Court's previous decisions dealing with ex parte garnishment statutes, *Fuentes v. Shevin, supra*; *Mitchell v. W.T. Grant, Co.*, 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974); *North Georgia Finishing, Inc. v. Di-Chen, Inc.*, 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975); *Connecticut v. Doehr*, 501 U.S. 2, 111 S. Ct. 2105 (1991), the city of Inglewood Police Officers intervened in a private "repossession" of Petitioner's automobile without the aid of a court order or a post-deprivation hearing along with the option of damages.

To determine what process is constitutionally due, the Court has generally balanced three factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probate value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest." *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982).
>
> In the case at bar, the property interest that will be affected is significant, the risk of an erroneous deprivation and through the procedures used is substantial and there is not evidence of additional or substitute procedural safeguards. *Connecticut v. Doehr*, 501 U.S. at 13.
>
> While Petitioner's daughter, Nicole Wade, has an interest in the immediate "repossession" of the car, the St. City's "substantive interest in protecting any rights of [Nicole Wade] cannot be any more weighty than those rights themselves." *Connecticut v. Doehr*, 501 U.S. at 17.

Nicole Wade's interest in immediate "repossession" of the car, without notice and prior hearing, cannot outweigh the other factors of the *Matthews v. Eldridge, supra*, balancing test, even if the interest is not *de minimis*.

There is no evidence that pending such a hearing, that Petitioner would render the car unavailable to satisfy a judgment.

In the case at bar, City policymakers can hardly claim that the law was not "clearly established" and that they did not have "fair warning" that a citizen such as Petitioner was not entitled to minimal due process (*i.e.* notice and a prior hearing) before the City's police officers may assist a private individual in repossessing [her] property.

The seizure of Petitioner's car resulted from Officer Wallace and the other nine police officers responding to an officer assistance call. (App. at 9a).

City of Inglewood policymakers "know to a moral certainty", *Canton,* at 1205, n. 10, that their officers will be called upon to assist in repossessions of private property.

Officer Wallace's testimony provides the empirical evidence to confirm the hypothesis. His testimony, quoted by the district court and the Ninth Circuit Panel reads:

> "Q: You've had other officer assistance calls of this type prior to this?
>
> A: Oh, yes. Many.
>
> Q: Was there any rule of thumb that you would use, a policy that you had, verbal policy that you'd ever been instructed on how to carry out such an inquiry? [In] other words, had you ever had a situation with the car being requested to be removed?

A: Yes. Car, furniture, baby. It [runs] a gamut. Anything and everything. I've encountered most all of it.

Q: Was there any kind of policy with the Police Department how that's supposed to be handled?

A: Well, you are supposed to conduct yourself in a professional manner, reflecting the best image of the Department, as a rule. And it's my rule. I tend to, in a way, admonish the individuals I'm with that in an assistance type situation, if somebody asked to accompany the person that I'm assisting, that there will be no arguing with anybody, there will be no confrontations, and basically that's the ground rules that I lay down." (App. at 4a, 19a-20a).

Yet, "there is no written policy produced by the City of Inglewood or the Policy Department that covers seizures of property of this kind." (App. at 12a, 18a-19a).

And as quoted above, Officer Wallace testified:

"Q: Was there any kind of policy with the Police Department how that's supposed to be handled?

A: Well, you are supposed to conduct yourself in a professional manner, reflecting the best image of the Department, as a rule. And it's my rule.

> I tend to, in a way, admonish the individuals I'm with that in an assistance type situation, if somebody asked to accompany the person that I'm assisting, that there will be no arguing with anybody, there will be no confrontations, and basically that's the ground rules that I lay down." (App. at 4a, 19a-20a).

In light of "clearly established" law regarding the constitutional limitations of state involvement in private repossessions of property, it would appear that there is a triable issue of "inadequate training."

Petitioner's produced evidence of a "policy of inaction" functionally equivalent to a decision by the City itself to violate his constitutional right to procedural due process of law protected under the Fourteenth Amendment to the United States Constitution.

Futhermore, under the circumstances, Petitioner had a "clearly established" right to be protected from an unreasonable seizure of his property.

The substantive component of the Fourteenth Amendment incorporates the constitutional guarantees of the Fourth Amendment which protects unreasonable seizures of property. *Soldal v. Cook County, Illinois,* 506 U.S. 56, 59, 62-69, 113 S. Ct. 538, 544-548, 121 L. Ed. 2d 450.

"[T]he categories of the Due Process Clause under the Due Process Clause under the United States Constitution are distinct," and, "[w]ere the rule otherwise, the Clause would be reduced to a mere tautology." *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 543, 108 S. Ct. 1487, 1493 (1985).

Thus, Petitioner's constitutional guarantees under the procedural component of the Due Process Clause does not exhaust the guarantees under the substantive component of the Due Process Clause. *Albright v. Oliver,* 510 U.S. 266, 273-274, 114 S. Ct. 807, 813, 127 L. Ed. 2d 114 (1994) (Rehnquist, C.J., for plurality).

Officer Wallace and the other officers assisted Nicole Wade's in a "repossession" of her car without a court order, of any type. Prior to entering onto Petitioner's property, Officer Wallace did not check the registration of the car, or confirm that Petitioner's daughter was the owner. (App. at 8a-9a).

After Officer Wallace entered on to the property, Petitioner asserted the car was his, and that his daughter could not take it away. (App. at 9a). When Officer Wallace called in the license plate and was told that Petitioner's daughter was the registered owner, Officer Wallace stated to Petitioner, "She [Nicole Wade] gets the car." (App. at 9a).

Officer Wallace made no further inquiry of Nicole Wade regarding the dispute to possession of the car, yet Nicole Wade admits that the care was erroneously registered to her name. (App. at 8a).

Officer Wallace's and the police officers who proceeded to remove the car from the premises, acted unreasonably under the circumstances and violated Petitioner's "clearly established" rights guaranteed under the Fourth Amendment to the United States Constitution.

It is obvious under these circumstances that Officer Wallace and the officers who assisted him in "repossessing" Nicole Wade's car had not been trained in the constitutional limitations of civil seizures arising under the Fourth Amendment to the United States Constitution.

CONCLUSION

For the reasons stated, Petitioner respectfully requests that his Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MARCH 11, 1997

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-56745

D.C. No. CV-94-07958-WMB

KARL WADE,

Plaintiff-Appellant,

v.

CITY OF INGLEWOOD,

Defendant-Appellee.

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
William Matthew Byrne, Jr., District Judge, Presiding

Submitted March 7, 1997**
Pasadena, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

Appendix A

Before: FARRIS, KOZINSKI, and T.G. NELSON, Circuit Judges.

Karl Wade ("Wade") timely appeals the district court's grant of summary judgment in favor of the City of Inglewood ("the City") on Wade's claim under 42 U.S.C. § 1983. We review the district court's summary judgment order *de novo*. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). We have jurisdiction under 28 U.S.C. § 1291. We affirm.

ANALYSIS

Municipalities can be held liable under § 1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy" causes the injury. *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 693 (1978). Wade may establish municipal liability in three ways:

> First, [Wade] may prove that a city employee committed the alleged constitutional violation pursuant to a formal governmental policy or a longstanding practice or custom which constitutes the standard operating procedure of the local governmental entity. . . . Second, [Wade] may establish that the individual who committed the constitutional tort was an official with final policy-making authority and that the challenged action itself thus constituted an act of official governmental policy. . . . Third, [Wade] may prove that an official with final policy-making authority ratified a

> subordinate's unconstitutional decision or action and the basis for it.

Gillette v. Delmore, 979 F.2d 1342, 1346-47 (9th Cir. 1992) (quotations and citations omitted). Wade has failed to provide sufficient evidence for any of these forms of municipal liability with regard to his alleged constitutional violations that would defeat summary judgment.

A. *Seizure of the Car*

The mere fact that the City of Inglewood police department has a procedure for dividing its calls among duty officers, called "officer-assist calls," does not constitute a municipal policy governing the specific method of property seizure alleged in the complaint to be unconstitutional. As Officer Wallace testified in his deposition:

> Any call that comes in where an officer is dispatched to, it would, in essence, be an assist call. Whether it's just to go over and see if by chance you can unlock a lady's car door or if it's to have intervention in a family disturbance. It's still an assist call. Every call, in essence, can be an assist call.

Such a general statement regarding police procedure is insufficient to support a finding that a particular municipal policy caused the allegedly unconstitutional seizure of the car.

Wade's attempt to demonstrate a verbal practice or custom of seizing property by committing constitutional violations also fails. Wade points to the following excerpt from Officer Wallace's deposition:

Appendix A

Q: You've had other officer assistance calls of this type prior to this?

A: Oh, yes. Many.

Q: Was there any rule of thumb that you would use, a policy that you had, verbal policy that you'd ever been instructed on how to carry out such an inquiry? [In] other words, have you ever had a situation with the car being requested to be removed?

A: Yes. Car, furniture, baby. It [runs] a gamut. Anything and everything. I've encountered most all of it.

Q: Was there any kind of policy with the Police Department how that's supposed to be handled?

A: Well, you are supposed to conduct yourself in a professional manner, reflecting the best image of the Department, as a rule. And it's my rule. I tend to, in a way, admonish the individuals I'm with that in an assistance type situation, if somebody asked to accompany the person that I'm assisting, that there will be no arguing with anybody, there will be no confrontations, and basically that's the ground rules that I lay down.

The district court correctly concluded that these statements fail to prove any custom with regard to property seizures and "merely indicates that he is regularly requested to recover property." No reasonable reading of this testimony could lead a rational trier of fact to conclude that Officer Wallace customarily participated in seizures of property where he did not have objectively reasonable grounds to do so.

Finally, despite Wade's claims to the contrary, there is no record evidence that demonstrates that Officer Wallace either had final policy-making authority in matters relating to property seizures or had his conduct ratified by an official with final policy-making authority. The mere fact that Wade's complaints to the police department did not cause an official policymaker to overrule the allegedly unconstitutional discretionary acts of Officer Wallace is insufficient to defeat summary judgment in favor of the City. *See Gillette*, 979 F.2d at 1348.

B. *Allowing Two Individuals to Enter Wade's Property*

Wade has failed to provide any evidence of a municipal policy allowing officers to engage in this allegedly unconstitutional practice when conducting a property seizure. Wade's citation to Officer Wallace's testimony quoted above is unavailing because it merely addresses his attempt to avoid confrontation and does not discuss where interested individuals who are involved in the property seizure are to stand or not to stand. The evidence simply does not discuss the officer's handling of or authority over such individuals at all. Therefore, no rational trier of fact could conclude that the City maintained a policy or custom that allowed officers to engage in the conduct complained of here.

Appendix A

C. *Alleged Assault and Use of Racially Abusive Language*

While Wade concedes that there is no evidence that this conduct was part of a pattern of similarly abusive behavior, he nevertheless argues that the City maintained an unwritten policy that allows officers to engage in such behavior in order to effectuate a property seizure. This argument fails to defeat summary judgment for the City.

There is no record evidence that the City maintained a policy or practice, written or unwritten, that would allow a police officer to engage in racial taunting or other racially abusive behavior in order to complete a property seizure. Wade has also presented no evidence that the City delegated the authority to decide whether or not to use racially abusive language in such situations to its officers. Without such evidence, Wade's § 1983 claim must fail.

CONCLUSION

After considering Wade's arguments on appeal and the entire evidentiary record, we conclude that the district court correctly granted summary judgment in favor of the City. We therefore affirm.

AFFIRMED.

APPENDIX B — ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA FILED OCTOBER 26, 1995

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 94-7958-WMB

KARL WADE

Plaintiff,

v.

CITY OF INGLEWOOD; AND DOES 1 THROUGH 100 INCLUSIVE

Defendants.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. BACKGROUND

Plaintiff Karl Wade had brought this suit under 42 U.S.C. §1983, claiming that his constitutional rights had been violated through the misconduct of one of defendant city's police officers. Defendant now moves for summary judgment, on the grounds that plaintiff has not identified an official policy or custom that would yield municipal liability under §1983.

In the light most favorable to the non-moving party, the facts of the case appear as follows.

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The plaintiff and his daughter, Nicole Wade, age 18, had an argument on September 14, 1994, shortly after noon, apparently about her lack of attendance at college. (Plaintiff's Memorandum of Points and Authorities ("Plaintiff's P&A"), p. 2). The plaintiff allegedly hit his daughter, who had been living with her parents in their Inglewood home, and she fled the premises. (Defendant's Memorandum of Points and Authorities ("Defendant's P&A"), p. 3). Shortly thereafter, the daughter called the Inglewood Police Department to obtain assistance in retrieving some of her personal belongings from her parents' house, including her car. (*Id.*)

The car, a 1989 Toyota Celica, was purchased in August, 1993. Most of the purchase money came from plaintiff and his wife, but the car was always registered in daughter Nicole's name. Nicole admits that she was supposed to change the registration to her brother's name, but had refused to do so. (Nicole Wade deposition, Plaintiff's Decl. Exh. 5, pp. 46-67) The son, apparently using the funds of the family business, has always paid for maintenance and insurance on the car. (Plaintiff's P&A at 2).

The first officer to respond to Nicole's call for assistance on September 14, 1994, was Officer Robert Wallace. (Wallace deposition, Plaintiff's Decl. Exh. 6, p. 20). Nicole, who had been joined by her boyfriend and one other friend outside of the Wades' house, explained that she wanted assistance in retrieving her car, which she feared was being disabled or disassembled by her father and brother. The car was parked, apparently out of view from the street, behind the Wades' house. (*Id.* at 21).

Officer Wallace, before venturing onto the Wades' property, did not obtain the license plate number of the car, check its

registration, or otherwise confirm that Nicole was indeed the owner. (*Id.* at 36-38). Officer Wallace, Nicole, and the two others then proceeded down the driveway of the house to the car, where plaintiff met them and asserted that the car was his, and that his daughter could not take it away. At that point, Officer Wallace called in the license plate number of the car, and was told that Nicole was the registered owner. Officer Wallace then told plaintiff, "Excuse me. But the car is registered to her. She gets the car." (*Id.* at 36).

After plaintiff and his son had come outside, plaintiff claims that Nicole's boyfriend began taunting them, calling them "punks," and telling plaintiff, an immigrant, to "go back to Belize." (Karl Wade Deposition, Defendant's Decl. Exh. E, pp. 78-79). Plaintiff became concerned that his son, who has a psychological condition from a head injury sustained in military service, would react poorly to the taunting, and that violence would ensue. Plaintiff asked Officer Wallace to remove Nicole's boyfriend from the premises. Wallace allegedly refused, and stated that after he was through with plaintiff's son, he would have more than just a psychological problem. (*Id.* at 79-80) .

Plaintiff again asked that Officer Wallace remove Nicole's boyfriend, but Wallace allegedly told him "You foreigner. Go back to Belize. This is not Belize." (*Id.* at 81-82). Plaintiff then told Wallace that, if he was going to behave in that manner, that he should leave the property. Officer Wallace responded by allegedly pointing his finger in plaintiff's face and telling plaintiff to take his "first hit." (*Id.* at 82-83).

Officer Wallace, along with nine officers that responded to his call for back-up, proceeded to remove the car from the premises; Nicole collected her other personal effects and left the house.

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Plaintiff sued under 42 U.S.C. §1983, alleging "that by acting to deny plaintiff the right to be secure in his person and home from bodily danger as other similarly situated residents," defendant violated his constitutional rights to privacy and equal protection of the laws. (Complaint ¶¶ 13-15). The complaint also alleged that the police officers involved had "acted according to official policy, custom, and practice" of defendant. (Complaint ¶ 14).

II. STANDARD

A. *Summary Judgment*

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Facts are deemed "material" if a dispute over them "might affect the outcome of the suit under the governing law. . . ." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986). Thus, if there is no genuine factual issue that would, if it were resolved in favor of plaintiff, indicate municipal liability here, then summary judgment is appropriate.

B. *Municipal Liability Under §1983*

Municipalities, like defendant, are not liable for all constitutional deprivations inflicted by their employees. It is only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that

the government as an entity is responsible under §1983." *Monell v. Department of Social Services*, 98 S.Ct. 2018, 2037-38 (1978). Since *Monell*, courts have developed various means to determine whether or not a municipal policy or custom exists. Three of those tests are arguably relevant here.[1]

First, actions by persons with final authority for decision-making constitute official custom or policy. *See Pembaur v. City of Cincinnati*, 106 S.Ct. 1292, 1299 (1986). The actor should "have authority to establish binding policy" for the municipality with respect to the relevant matter. *Davis v. Macon County*, 927 F.2d 1473, 1480 (9th Cir. 1991). Determination of whether an individual has final decision-making authority is a question of state law, and is for the court to decide. *See City of St. Louis v. Praprotnik*, 108 S.Ct. 915 (1988).

Second, a plaintiff can prove an official policy by showing evidence of inadequate training or supervision of municipal officers. *See City of Oklahoma v. Tuttle*, 105 S.Ct. 2427 (1985). The standard for showing an official policy through this method is high: The plaintiff must show that the failure to train constituted deliberate indifference to the deprivation of constitutional rights. *See City of Canton, Ohio v. Harris*, 109 S.Ct. 1197, 1204-05 (1989). Deliberate indifference is "conduct that is so wanton or reckless with respect to 'unjustified infliction of harm as is tantamount to a knowing willingness that it occur.' " *Redman v. County of San Diego*, 942 F.2d 1435, 1443 (9th Cir. 1991), *quoting Whitley v. Albers*, 106 S.Ct. 1078, 1085 (1986).

Third, a municipality might be liable under §1983 for a long-

1. Other tests for municipal liability are clearly not relevant, because there is no formal, official policy of the defendant city with respect to the officers' alleged constitutional violations. (*See* Plaintiff's P&A at 8).

standing practice that causes constitutional deprivation, even if the practice has no formal legislative or administrative approval. *See Monell*, 98 S.Ct. at 2036; *Pembaur*, 106 S.Ct. at 1292 n. 10. A plaintiff "may attempt to prove the existence of a custom or informal policy with evidence of repeated constitutional violations for which the errant municipal officials were not discharged or reprimanded." *Gillette v. Delmore*, 979 F.2d 1342, 1349 (9th Cir. 1992). To prevail under this theory, a plaintiff must show a settled, widespread, recurring practice of constitutional violations. *See Praprotnik*, 108 S.Ct. at 926.

III. DISCUSSION

Plaintiff's complaint and opposition to this motion seem[2] to assert that his constitutional rights were violated by three actions of Officer Wallace and his colleagues: the taking of Nicole's two friends onto the Wades' property and subsequent refusal to remove them; Officer Wallace's pointing in plaintiff's face and his use of abusive language; and the seizure of the car without permission or warrant.

There is no formal policy of defendant that dictates that police officers should behave in the manner that Officer Wallace allegedly did. (Plaintiff's P&A at 8). Accordingly, plaintiff must establish municipal liability by some other theory. *See supra* section II.B.

A. *Whether Officer Wallace's taking Nicole's two friends onto the Wades' property can trigger municipal liability under §1983*

Officer Wallace made the decision to allow Nicole's two

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2. Plaintiff's pleadings are often ambiguous; an issue relating to that ambiguity is discussed *infra*, section III.C.a.

friends onto the Wades' property. But plaintiff shows no evidence that Officer Wallace has final decision-making authority for the city with respect to that issue. Accordingly, municipal liability cannot be predicated on that theory. *See Davis*, 927 F.2d at 1480

Further, plaintiff shows no evidence that this type of alleged constitutional violation has occurred in the past. The closest that the evidence comes to establishing past violations is in the deposition of Officer Wallace, where he describes his decision to allow two of Nicole's friends to come along onto the Wades' property:

> Q: Now, is there any policy you are aware of that would not allow those two individuals to come onto the property with you? In other words, Nicole, I assume, was necessary for you to identify the car; right? Is that correct? In other words, that would be one of the reasons why she would be allowed to come with you?
>
> A: Yes. Yes.
>
> Q: Was there any policy you knew of or reason why they would not be allowed to come with you?
>
> A: If — . . .
>
> Q: Let me be specific. In this particular situation, was there any reason that would not allow these two individuals to come with you?

A: If there had been an initial indication that they would have [provoked] hostilities, absolutely they would have stayed out front.

Q: Was there any reason why you were allowing them to come with you? In other words, did you request them in assisting you in terms of —

A: No. They asked if they could accompany her. And, at that point, having no prior knowledge that they were part of Mr. Wade's latter hostilities, I didn't see any reason why they couldn't.

Q: . . . I'm asking as far as your state of mind at the time, did you believe that they were coming on for any particular reason other than they had asked you to come [on] the property?

A: No.

(Plaintiff's P&A at 11). That testimony relates to why Officer Wallace allowed Nicole's friends onto the Wades' property, but says nothing about whether the practice of letting third parties onto private property is customary. The cited portion of the deposition seems tailored to this specific incident, rather than any widespread practice. No other evidence suggests the existence of such a practice.

Thus, municipal liability cannot be predicated on the

existence of an informal, but prevalent, custom. *See Gillette*, 979 F.2d at 1349 (no evidence of custom where "no evidence in the record that any other City employee has ever been [similarly treated]"). Because there is no evidence that this sort of alleged constitutional violation has ever occurred in the past, it is difficult to charge defendant with "deliberate indifference to constitutional rights" by not training its officers to avoid such behavior. *See City of Canton*, 109 S.Ct. at 1204-05 (requirement of deliberate indifference); *Redman*, 942 F.2d at 1443 (definition of deliberate indifference).

No evidence, then, supports a finding that defendant should be liable with respect to Officer Wallace's allowing Nicole's two friends onto the Wades' property.

B. *Whether Officer Wallace's alleged assault and verbal abuse can trigger municipal liability under §1983*

Plaintiff presents no evidence that would indicate Officer Wallace's alleged assault and use of abusive language was preceded by similar actions by defendant's officers. That precludes a finding of municipal liability because of an informal "custom" or through "deliberate indifference" through a failure to train officers properly. *See Gillette*, 979 F.2d at 1349; *City of Canton*, 109 S.Ct. 1204-05; *Redman*, 942 F.2d at 1443. Nor can Officer Wallace's assault or verbal abuse be characterized as the actions of a person with final decision-making authority. *See Davis*, 927 F.2d at 1480.

Accordingly, defendant city cannot be held liable under §1983 for Officer Wallace's alleged assault and abusive language.

Appendix B

C. *Whether seizure of the car can trigger municipal liability under §1983*

One issue must be resolved before turning to whether summary judgment is appropriate with respect to the alleged unconstitutional seizure of the car.

a. Whether plaintiff's theory of liability regarding the seizure of the car should be ignored because it is outside the scope of his complaint

Defendant argues that the Court should disregard plaintiff's theory of liability concerning the unconstitutional seizure of the car, because that theory is outside the scope of plaintiff's pleadings.[3] Defendant argues that the plaintiff's opposition to summary judgment

> [f]or the first time [sets] forth allegations regarding an unlawful seizure of an automobile in which plaintiff allegedly retained a possessory interest. However, there are no allegations in the Complaint regarding an unlawful seizure; and, there are no responses to discovery — including plaintiff's own deposition testimony — that concern an unlawful seizure. . . . Plaintiff

3. Defendant also notes that plaintiff failed to controvert any of the facts listed in defendant's "Separate Statement of Uncontested Fact," as indicated by Local Rule 7.14.2. As defendant points out, the Court may therefore treat those facts to be admitted for purposes of this summary judgment motion. *See* Local Rule 7.14.3. That is true, but none of the facts in defendant's Separate Statement are relevant to the determination of whether defendant is subject to municipal liability under §1983.

> should not now be allowed to raise novel issues and theories to defeat a viable summary judgment motion.

(Defendant's Reply, p. 6) .

Defendant properly points to *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994), to support its argument that allegations not included in the complaint may be disregarded by a court in evaluating a summary judgment motion. However, there are two problems with defendant's argument.

First, it is not clear that plaintiff's complaint makes no reference to the seizure allegations. Although it is true that the complaint does not make specific allegations regarding the seizure of a car, paragraph 14 of the complaint alleges that the "actions of the [defendant] were done in a manner that deprived plaintiff of his right to privacy as guaranteed by the Fourth Amendment to the Constitution of the United States." The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. That reference to the Fourth Amendment might, conceivably, be interpreted to reflect plaintiff's subsequent, more explicit, allegations of an unconstitutional seizure.

Even rejection of this somewhat tortured interpretation of the plaintiff's complaint, however, leaves another option. Despite defendant's attention to *Kaplan*, it neglects to point out that "[a]n addition of new issues during the pendency of a summary judgment motion can be treated as a motion for leave to amend the complaint." *Id.* at 1370. The Court has discretion in whether to allow such amendment, "keeping in mind the strong policy

in favor of allowing amendment, and considering four factors: bad faith, undue delay, prejudice to the opposing party, and the futility of amendment." *Id.*

Although there is no indication of bad faith, it is, at first glance, somewhat difficult to fathom why plaintiff did not include the seizure allegations originally. The seizure of the car would seem to have been the central element in the incident between plaintiff and Officer Wallace. "Late amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action." *Acri v. International Ass'n of Machinists*, 78 F.2d 1393, 1398 (9th Cir. 1986). But although the facts of the seizure were known at the inception of the case, it may not have been until after Officer Wallace's deposition that plaintiff's theory of liability emerged — because it was only then that an alleged municipal custom of unwarranted seizures was revealed.

Therefore the seizure allegations will be considered in evaluating the summary judgment motion.

b. Municipal liability for the seizure of the car

As with the other alleged constitutional violations, the decision to seize the car was made by Officer Wallace, who cannot be deemed the final decision-maker with respect to defendant city's policy on the subject. Accordingly, that method of establishing municipal liability is inapposite. *See Pembaur*, 106 S.Ct. at 1299; *Davis*, 927 F.2d at 1480.

Plaintiff admits that "there is no written policy produced by the City of Inglewood or the Police Department that covers

seizure of property of this kind." (Plaintiff's P&A at 8). Plaintiff is left, therefore, in the position of having to show the existence of a widespread practice of unconstitutional seizures. Plaintiff asserts that "the testimony of Officer Wallace seems to clearly establish [sic] a policy, practice or custom on the part of the City of Inglewood Police Department to assist in [the unlawful] seizure of property." (Plaintiff's P&A at 8). Plaintiff recites the following portion of testimony in an attempt to support his argument:

> Q: You've had other officer assistance calls of this type prior to this?
>
> A: Oh, yes. Many.
>
> Q: Was there any rule of thumb that you would use, a policy that you had, verbal policy that you'd ever been instructed on how to carry out such an inquiry? IN [sic] other words, had you ever had a situation with the car being requested to be removed?
>
> A: Yes. Car, furniture, baby. It sums [sic] a gamut. Anything and everything. I've encountered most all of it.
>
> Q: Was there nay [sic] kind of policy with the Police Department how that's supposed to be handled?
>
> A: Well, you are supposed to conduct yourself in a professional manner,

> reflecting the best image of the Department, as a rule. And it's my rule. I tend to, in a way, admonish the individuals I'm with that in an assistance type situation, if somebody asked to accompany the person that I'm assisting, that there is will [sic] be no arguing with anybody, there will be no confrontations, and basically that's the ground rules that I lay down.

(Plaintiff's P&A at 9-10).

Contrary to plaintiff's assertion, the cited testimony only serves to establish, at most, a custom of assisting to remove a variety of items: cars, furniture, babies, etc. Nowhere does it supply any evidence of a custom of unconstitutional seizures. Officer Wallace's testimony does not indicate that he, or anyone else, regularly seizes property without objectively reasonable grounds; it merely indicates that he is regularly requested to recover property.

Accordingly, the Court finds that plaintiff has failed to show evidence of a custom of unlawful seizures within defendant's police department. Without any evidence of past unlawful seizures, plaintiff has not established that defendant has shown "deliberate indifference" to constitutional rights through a failure to train officers like Wallace about proper procedures in "officer assist calls." *See supra* section III.A; *Gillette*, 979 F.2d at 1349; *City of Canton*, 109 S.Ct. 1204-05; *Redman*, 942 F.2d at 1443.

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IV. CONCLUSION

There is no genuine issue of material fact here; plaintiff has shown no evidence of a policy or custom of constitutional violations by defendant City or Inglewood or its police department. Under the standards set by *Monell* and its progeny, there can be no municipal liability here. Defendant is entitled to judgment as a matter of law.

Defendant's motion for summary judgment is GRANTED.

DATED: Oct 24, 1995

s/ Wm. Matthew Byrne, Jr.
Wm. Matthew Byrne, Jr.
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED APRIL 29, 1997

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-56745

D.C. No. CV-94-07958-WMB

KARL WADE,

Plaintiff-Appellant,

v.

CITY OF INGLEWOOD,

Defendant-Appellee.

ORDER

Before: FARRIS, KOZINSKI, and T.G. NELSON, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing. Judge Kozinski and Judge T.G. Nelson vote to reject the suggestion for rehearing en banc and Judge Farris so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appendix C

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.